

December 14, 2011

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BY E-FILING

Ms. Cynthia Brown
Chief Administration, Office of Proceedings
Surface Transportation Board
395 E Street, N.W.
Washington, D.C. 20423

RE: FD 35582, Rail-Term Corp., Petition for A Declaratory Order

Dear Ms. Brown:

Pursuant to a referral order issued by the United States Court of Appeals for the District of Columbia Circuit, I am submitting on behalf of Rail-Term Corp. an original and ten copies of its Petition for A Declaratory Order. In addition, I am enclosing a filing fee check payable to the Board for \$1400 and a copy of this Petition on a computer disk.

Please date stamp and return one copy of this filing,

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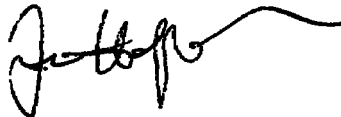
DEC 14 2011

**SURFACE
TRANSPORTATION BOARD**

JDH:jg

cc: Dennis M. Devaney, Esq.

Sincerely yours



John Heffner

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Strasburger & Price, LLP

ORIGINAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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MANAGEMENT

FD 35582

**RAIL-TERM CORP.
PETITION FOR A DECLARATORY ORDER**

Submitted by

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Dated: December 14, 2011

EXPEDITED HANDLING REQUESTED

FILED

DEC 14 2011

**SURFACE
TRANSPORTATION BOARD**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FD 35582

**RAIL-TERM CORP.
PETITION FOR A DECLARATORY ORDER**

INTRODUCTION

Pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721(a), Rail-Term Corp. (“Rail-Term”) files this Petition for a Declaratory Order seeking a ruling from the Surface Transportation Board (“the STB”) that it is not a “rail carrier” within the meaning of the I.C.C. Termination Act (“ICCTA”), 49 U.S.C. 10102(5). Rail-Term submits this Petition as directed by the United States Court of Appeals for the District of Columbia Circuit in its Order and Memorandum dated November 14, 2011.¹ A copy of that decision is attached here as Exhibit A. Rail-Term requests expedited handling by the STB since the matter is held in abeyance by the D. C. Circuit pending the STB determination.

¹ Cited as “November 14 Order and Memorandum.”

BACKGROUND

As the STB will recall from the previous declaratory relief request submitted by the Petitioner on June 3, 2010, Rail-Term is a small privately held Michigan corporation and a subsidiary of Canadian corporation Rail-Term Inc. Rail-Term Inc., and subsidiaries Rail-Term and Centre Rail-Control Inc., are engaged in a variety of business activities that support the railroad industry in both the United States and Canada. As relevant here, Rail-Term and its sister corporation in Canada, Centre Rail-Control Inc., provide dispatching software and dispatching services for short line and regional freight railroads and for VIA RAIL CANADA, Canada's national passenger railroad. Rail-Term does not own any lines of railroad, operate trains, hold itself out to provide transportation for compensation, or own, lease, or operate any railroad locomotives or rolling stock, or hold any sort of license from the STB to operate as a rail carrier or common carrier by railroad in the United States.

More specifically, Rail-Term develops computer-based dispatching software and provides dispatching services for several American short line railroads from an office in Rutland, VT. In effect, Rail-Term's rail carrier clients have "outsourced" to Rail-Term the dispatching functions that they

could otherwise provide “in house.” Rail-Term currently employs 7 people in its US office and, along with its corporate parent and Canadian sibling, employs about 100 people overall. Rail-Term provides dispatching services in the United States for the Aberdeen Carolina and Western Railway Inc., Carolina Coastal Railway, St. Lawrence and Atlantic Railroad (a Genesee & Wyoming subsidiary), Royal Gorge Express, LC, Washington and Idaho Railway, and short line holding company, Omni-Trax, Inc., and its subsidiary railroads. Neither Rail-Term, Rail-Term Inc., nor Centre Rail-Control Inc., own, are owned by, or are under common control with any rail carrier in the United States or Canada.

The need for this declaratory ruling dates back to April 6, 2010, when Rail-Term received an initial decision from the United States Railroad Retirement Board (“RRBD”)² finding it to be a “carrier employer” under the Railroad Retirement Act and the Railroad Unemployment Insurance Act (the “RRA” and the “RUIA” and collectively “the Acts”). According to the RRBD in its Initial Decision, there are two alternative statutory bases for that agency to find that an entity could be considered a “covered employer”

² Hereafter “the Initial Decision.” Management member Kever dissented stating that he did not believe that Rail-Term would be considered a carrier by the STB. Dissenting opinion of Management Kever at page 1, attached hereto as Exhibit B.

subject to its jurisdiction. An entity could be considered an “employer” subject to the RRBD’s jurisdiction if it is either

- (1) [a] carrier by railroad subject to the jurisdiction of the Surface Transportation Board (“STB”) or
- (2) [a] company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service....in connection with the transportation of passengers or property by railroad.”

See, 45 U.S.C. 231(a) (1). The RRBD found that Rail-Term was not subject to its jurisdiction under the second test

[b]ecause Rail-Term is neither owned by nor under common control with a rail carrier, a majority of the Board finds that it does not fall within the second definition of an employer under the Acts.

Nevertheless, the RRBD found Rail-Term a carrier employer under the RRA and RUIA despite the lack of any common carrier “holding out,” operation of trains, ownership of railroad lines or equipment, or grant of operating authority from the STB or the Interstate Commerce Commission. Instead it premised its finding on “the control that dispatchers have over the motion of trains.” Initial Decision at 3-4.

Since Rail-Term strongly disagreed with the Initial Decision, it sought review by filing a petition for reconsideration and administrative stay with the RRBD on July 9, 2010. Inasmuch as the RRBD has frequently based its “coverage rulings” finding entities subject to its jurisdiction under the RRA

and RUIA on rulings from the STB, Rail-Term petitioned this agency on June 3, 2010, for a decision confirming that it is not a “rail carrier”³ as that term is used in the ICCTA.

On October 12, 2010, the STB issued a decision denying Rail-Term’s declaratory order request stating that “the Board need not issue a declaratory order when another federal agency has ruled on the matter, and the matter has not been referred to the Board.” More specifically, the STB declined to issue a ruling because there was no referral from the RRBD and because the RRBD did not stay its proceedings to permit Rail-Term to obtain the [Surface Transportation] Board’s views. Furthermore, the STB stated Rail-Term had not indicated that it has sought reconsideration of the coverage decision (i.e., the Initial Decision).⁴ The Board also deferred ruling on Rail-Term’s request in view of the fact that the RRBD’s coverage decision in Trinity Railway Express—Train Dispatching—Herzog Transit Services⁵ was pending review in the United States Court of Appeals for the Seventh Circuit

³ The ICCTA speaks in terms of a “rail carrier” whereas the RRA and RUIA use the term “carrier by railroad.” Rail-Term believes these terms are legally “fungible” and therefore uses them interchangeably. See note 10 at page 10.

⁴ In fact, Rail-Term did advise the STB that it was going to seek administrative reconsideration of the Initial Decision. At lines 5 through 8 of its previous petition to the STB, Rail-Term stated that “it plans to seek reconsideration of that erroneous ruling by filing both an administrative appeal with the RRBD and, in the event of a second adverse RRBD ruling, by seeking judicial review of that agency’s final decision.” June 3 Petition at page 4.

⁵ B.C.D. 09-53, Oct. 28, 2009.

and could affect the RRBD's future decision on reconsideration of the Rail-Term coverage decision.⁶

The RRBD issued its decision on reconsideration on January 28, 2011.⁷ Over a second dissent by management member Kever, it once again found coverage for Rail-Term as an employer as a "carrier by railroad" as well as under an alternate theory that Rail-Term's dispatcher employees are also employees of its carrier clients. The RRBD based its holding that Rail-Term is an employer on the notion that it was providing common carriage by rail in interstate commerce due to the "integral" nature of train dispatching to the overall operation of movement of goods by rail. The RRBD dismissed Rail-Term's argument that it is not a "rail carrier" under the ICCTA stating,

this argument misses the point. In determining what constitutes a rail carrier under the RRA and RUIA, the threshold inquiry begins with what constitutes a rail carrier subject to STB jurisdiction, but it does not end there. This is because the regulatory schemes of the RRA and ICCTA are not symmetrical. Standard Office Buildings Corporation v. United States, 819 F.2d 1371, 1378 (7th Cir. 1987). By virtue of the control that it exercises over the movement of trains, Rail-Term is a rail carrier within the meaning of that term under the RRA and RUIA. To hold otherwise would allow for easy erosion of the RRA and RUIA by parsing out interstate transportation by rail to non-covered entities. Reconsideration Decision at page 3.

⁶ This statement appears to contradict the STB's previous statement that Rail-Term had not indicated that it would seek reconsideration of the RRBD's Initial Decision.

⁷ Cited as the "Reconsideration Decision."

On March 28, 2011, Rail-Term appealed the Reconsideration Decision to the United States Court of Appeals for the District of Columbia Circuit. On appeal Rail-Term argued that it could not be a “covered employer” under the RRA and RUIA because it was not a “rail carrier” under the ICCTA or a “carrier by railroad” under the RRA and RUIA. Citing the 7th Circuit’s decision in Herzog Transit Services v. the United States Railroad Retirement Board,⁸ Rail-Term emphasized that it could not be a “rail carrier” under the plain meaning of the statute, that the language of the ICCTA and the RRA/RUIA is interchangeable, and that Congress intended for the term “carrier” to have the same meaning under these two statutes.

At oral argument the Court asked shouldn’t Rail-Term’s carrier status be resolved by the STB. Rail-Term replied that “we tried to do that” but the STB “chose not to address that issue.” During further questioning, Judge Ginsburg cited the primary jurisdiction of the Surface Transportation Board while acknowledging that the question of Rail-Term’s carrier status was not

⁸ 624 F.3d 467 (7th Cir. 2010) hereafter cited as “Herzog Transit.”

referred to the STB by either the RRBD or the Court but “this time it would be.”⁹

On November 14, 2011, the Court served its Order and Memorandum holding Rail-Term’s petition for review in abeyance pending further order of the Court to allow Rail-Term to petition the STB for a determination as to whether it is a “rail carrier” under 49 U.S.C. §10102(5). The Court referred that issue to the STB emphasizing that a resolution of that legal issue is within that agency’s primary jurisdiction. As the Court stated, “interpretation of the Railroad Acts [the RRA and RUIA] necessarily turns upon the interpretation of the ICCTA, as to which the STB is the agency with principal competence.” *See, November 14 Order and Memorandum*.

ARGUMENT

5 U.S.C. 554(e) and 49 U.S.C. 721, give the STB discretion to issue a declaratory order to terminate a controversy or remove uncertainty. *See, Norfolk Southern Railroad Company and the Alabama Great Southern Railroad Company-Petition for Declaratory Order*, FD 35196, STB served March 1, 2010. The issue here is a novel one: whether a company that supplies services to the railroad industry in the form of train dispatching is a

⁹ A copy of the relevant pages of the oral argument transcript is attached as Exhibit C.

“rail carrier”¹⁰ within the meaning of §10102(5) of the ICCTA. Rail-Term is filing this new Petition for Declaratory Relief in accordance with the Court’s instruction. It contends that this filing to clarify its “rail carrier” status is consistent with courses of action taken by other parties before the Surface Transportation Board that had initially been characterized by the RRBD as “rail carriers” under the ICCTA and therefore “covered employers” for RRA and RUIA purposes.¹¹ See, e.g., H&M International Transportation, Inc.-Petition for Declaratory Order, FD 34277, slip op., STB served November 12, 2003 (cited as “*H&M*”), and American Orient Express Railway Company LLC-Petition for Declaratory Order, FD 34502, slip op., STB served December 29, 2005(cited as “*American Orient Express*”). Rail-Term urges the STB to issue a decision finding that it is not a “rail carrier.”

**RAIL-TERM IS NOT A RAIL CARRIER
UNDER THE ICC TERMINATION ACT**

Rail-Term’s review of pertinent STB and RRBD decisions indicates there is little precedent directly on point as to the issue of the rail carrier status of a vendor of subcontracted services to carrier railroads which

¹⁰ The ICCTA uses the term “rail carrier” while the RRA and RUIA use the term “carrier by railroad.” Rail-Term believes they are one and the same and will use these terms interchangeably. See, Herzog Transit at 473, where the Court stated “[t]he [RRBD] seemed to assume, and we see no need to disagree, that Congress intended ‘carrier’ to have the same meaning for both of these closely related statutes and that the RRA therefore affords no broader coverage than the ICCTA.”

¹¹ Rail-Term does not seek any guidance from the STB as to its status under the RRA and RUIA. only under the ICCTA.

historically handled such functions “in house”. Compare H&M and American Orient Express, *supra*. Both of these STB decisions arose in connection with coverage status proceedings before the RRBD. According to the STB’s decision, H&M involved an entity operating warehousing, distribution, truck terminal, and intermodal facilities at various points in the United States. H&M provided services for contracting railroads such as the loading and unloading of trailers and containers and the moving, inspecting, and securing of trailers. At one of these facilities H&M also moved railcars around the site using its own switching locomotives. However, H&M did not operate beyond that facility and was prohibited by its contract with the serving railroad from providing common carrier rail service. In finding that H&M was not a “rail carrier” subject to its jurisdiction, the STB held

[t]he Board has jurisdiction over “transportation by rail carrier.” 49 U.S.C. 10501(a). The term “transportation” is defined to include a facility related to the movement of property by rail, and services related to that movement, including receipt, delivery, transfer, and handling of property. 49 U.S.C. 10102(9) (A), (B). A “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. 10102(5).

Whether a particular activity constitutes transportation by rail carrier under section 10501 is a fact-specific determination. H&M’s intermodal transloading activity could fit within the broad definition of transportation. [citations omitted] But this is only half of the statutory requirement for Board jurisdiction under section 10501.

To fall within the Board’s jurisdiction, the transportation activities must be performed by a rail carrier, and the mere fact that H&M

moves rail cars inside the Marion facility does not make it a rail carrier. To be considered a rail carrier under the statute, there must be “*a holding out*” [emphasis supplied] to the public to provide common carrier service. [citations omitted] Here, however, H&M’s operations are performed pursuant to agreements with UP that reserve for UP all common carrier rights and obligations and that, in fact, specifically bar H&M from providing common carrier service. Additionally, H&M has never received, nor sought, a license from the Board for common carrier freight rail operations under 49 U.S.C. 10901 (or an exemption from the licensing requirements pursuant to 49 U.S.C. 10502). Further, there is no evidence that H&M has provided any type of rail service to the public for compensation or otherwise, or held itself out as willing to do so. Indeed, the record shows that any rail-related activity performed by H&M is strictly in-plant, for H&M’s convenience and benefit, and in furtherance of its non-rail primary business purpose.

By comparison, American Orient Express (“AOERC”) was a company offering a “rail cruise” vacation experience over the American rail network using its own passenger rolling stock and on board crews in trains operated for it under contract by Amtrak. There the STB ruled that AOERC was a “rail carrier.” It found that AOERC did engage in “transportation” by handling passengers in railroad equipment that it owned, that its operation of trains through a contract with Amtrak constituted the provision of railroad transportation, and that it held itself out to the general public to provide transportation for compensation. Slip op. at 3-6.

Outside of the RRBD context, there is substantial STB and Interstate Commerce Commission precedent on the issue of what constitutes “common carriage.” *See, e.g., SMS Rail Service, Inc.*, FD 34483, STB served January

24, 2005, slip op. at 5, and B. Willis, C.P.A., Inc., FD 34013, STB served July 26, 2002, slip op at 6. Rail-Term is plainly not “a rail carrier” within the meaning of the ICCTA under that precedent because it does not (1) own or use any facility related to the movement of passengers or property by rail, (2) provide common carrier transportation for compensation, (3) “hold out” to the public to provide transportation for compensation, or (4) hold any license or exemption from the STB to perform common carrier rail operations.

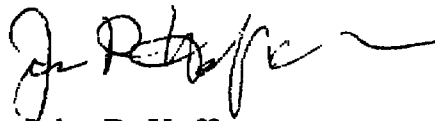
Moreover, Rail-Term is not a “carrier by railroad” under the RRBD’s precedent insofar as it does not own, lease, or control a rail line or retain the capacity to operate a rail line or operate as a common carrier or hold authority from the STB to do so. *See*, B.C.D. 09-02, Tri-County Commuter Rail Organization, *et al*, Jan. 20, 2009, slip op. at pages 3 and 6; B.C.D. 00-35, Cape Cod Central Railroad, Inc., Sept. 14, 2000; and B.C.D. 03-27, Northern New England Passenger Rail Authority, March 21, 2003, slip op.¹² Accordingly, the Surface Transportation Board should find that Rail-Term is not a “rail carrier” subject to its jurisdiction and should issue a ruling to that effect.

¹² Copies of the pertinent pages of these decisions are attached as Exhibits D through E.

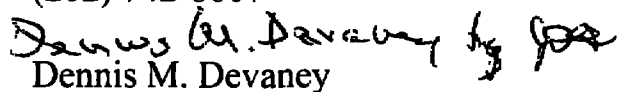
CONCLUSION

As directed by the Court, Rail-Term requests that the STB grant its Petition for a Declaratory Order and issue a declaratory ruling finding it not a "rail carrier" under the ICCTA. Furthermore, Rail-Term requests expedited handling inasmuch as the Court is holding the appellate proceeding in abeyance pending the outcome of this declaratory proceeding.

Respectfully submitted,



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Dated: December 14, 2011

EXHIBIT A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1093

September Term, 2011

Filed On: November 14, 2011

RAIL-TERM CORP.,

PETITIONER

v.

RAILROAD RETIREMENT BOARD,

RESPONDENT

Before: GARLAND and KAVANAUGH, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*

ORDER

Upon consideration of the petition for review and the briefs and oral arguments of the parties, for the reasons explained in the accompanying memorandum, it is

ORDERED that the petition for review be held in abeyance pending further order of the court to allow Rail-Term to petition the Surface Transportation Board for a declaratory order on the question whether Rail-Term is a “rail carrier” under 49 U.S.C. § 10102(5).

Rail-Term is directed to submit a report to this court on the status of its filings with the Surface Transportation Board no later than 30 days from the date of this order. The parties are directed to file motions to govern further proceedings in this case no later than 30 days after the Surface Transportation Board issues a decision on Rail-Term’s filings.

PER CURIAM

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark

Deputy Clerk

MEMORANDUM

Rail-Term petitions for review of an Order of the Railroad Retirement Board (RRB) holding it is a "carrier by railroad" within the meaning both of the Railroad Retirement Act, 45 U.S.C. § 231 *et seq.*, and of the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 *et seq.*, (hereinafter together referred to as the Railroad Acts) and holding in the alternative Rail-Term's dispatchers are "employees" of Rail-Term's client railroads under the same Acts. Because the former holding turns upon the resolution of a legal issue within the primary jurisdiction of the Surface Transportation Board (STB), we refer the issue to that agency. Pending the STB's resolution of the issue, we shall hold Rail-Term's petition for review in abeyance.

Rail-Term provides "outsourced" dispatching services that rail carriers historically have performed "in house." Rail-Term's client railroads provide daily scheduling orders to Rail-Term's Director of Rail Traffic Control, who then relays those orders to dispatchers employed by Rail-Term. Pursuant to those instructions, Rail-Term's dispatchers authorize the railroads' engineers and other employees, such as maintenance crews, to occupy particular tracks at specific times throughout the day.

The RRB held Rail-Term is an "employer" subject to the Railroad Acts because its "dispatchers have the ultimate control over the movement of the trains of its rail carrier customers." Both the Railroad Acts define an "employer" as a carrier by rail subject to "the jurisdiction of the Surface Transportation Board." See 45 U.S.C. § 231(a)(1)(i) (Railroad Retirement Act); 45 U.S.C. § 351(b) (Railroad Unemployment Insurance Act). The Interstate Commerce Commission Termination Act (ICCTA), which in turn prescribes the jurisdiction of the STB, defines a "rail carrier" as anyone "providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). In this respect, therefore, interpretation of the Railroad Acts necessarily turns upon interpretation of the ICCTA, as to which the STB is the agency with principal competence, *American Orient Exp. Ry. Co., LLC v. Surface Transportation Bd.*, 484 F.3d 554, 556 (D.C. Cir. 2007).

Because this case implicates an "issue within the special competence of an administrative agency," the doctrine of primary jurisdiction "requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993); see *Allnet Commc'n Serv., Inc. v. Nat'l Exch. Carrier Ass'n, Inc.*, 965 F.2d 1118, 1120 (D.C. Cir. 1992) (doctrine of primary jurisdiction based upon "concern for uniformity and expert judgment"). When an issue "requir[es] the exercise of administrative discretion," as does the issue whether a provider of outsourced dispatching services is a "rail carrier" within the meaning of the ICCTA, the "agenc[y] created by Congress for regulating the subject matter should not be passed over," *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64 (1956) (quoting *Far East Conference v. United States*, 342 U.S. 570, 574 (1952)).

Accordingly, we refer to the STB the question whether Rail-Term is a "rail carrier" under the ICCTA. We shall hold in abeyance Rail-Term's petition for review to allow Rail-Term to file with that agency a petition for a declaratory order on the matter pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721.

We do not reach the RRB's alternative holding that Rail-Term's dispatchers are "employees" of the railroads for which Rail-Term provides dispatching services. Whether Rail-Term is a proper party to challenge that alternative holding is unclear because the record does not indicate whether Rail-Term or the railroads for which it provides dispatching services would be required to contribute on behalf of those employees to the retirement and unemployment funds administered by the RRB. If the STB determines Rail-Term is not a "rail carrier," then we shall turn to the questions raised by the RRB's alternative holding and Rail-Term's standing to challenge it.

EXHIBIT B

MANAGEMENT MEMBER KEVER'S DISSENT RAIL-TERM COPORATION

A majority of the Board found Rail-Term to be a covered employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA). While I may agree with the majority that dispatching is an "inextricable part" of railroad operations, I can not agree with the majority that Rail-Term is itself a carrier under our Acts.

The Railroad Retirement Act (45 U.S.C . § 231 (a) (1)) (substantially the same as the RUIA) defines a covered employer as:

- (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49; United States Code;
- (ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph....

The majority finds Rail-Term to be a covered employer under subsection (i) above. Further, the majority cites Southern California Regional Rail Authority (SCRRA) B.C.D. 02-12 and Herzog Transit Services, Inc. B.C.D. 09-53 (Decision on Reconsideration - Management Member Kever Dissenting) as precedent supporting their conclusion. Because I do not believe that Rail-Term would be considered a carrier by the Surface Transportation Board (STB) under Part A of title 49 and also do not find the above cited decisions applicable to this case, I must dissent.

The Board's decision outlines the nature of dispatching and its relationship to other railroad operations. It also presents examples of how dispatching is regulated by federal agencies including the Federal Railroad Administration. However, the decision does not provide a basis upon which Rail-Term could actually be found to be an entity regulated under the jurisdiction of the STB. In American Orient Express Railway Company, v. Surface Transportation Board, 484 F3d 554 (D.C. Circuit 2007) the Court did not disturb the STB's finding that an entity that did not own tracks or utilize its own employees for movement of passenger trains could still be considered a railroad carrier where it provided its own rail cars and contracted with AMTRAK to move its passengers. Rail-Term may participate in directing car movements by dispatching, but it has not provided rail cars nor participated in interchange agreements or other arrangements to move freight.

The majority decision also cites two prior Board decisions in SCRRA and Herzog Transit Services as support for its determination. These decisions present facts very different than the instant case since both applied factors from the Board's decision in Railroad Ventures, Inc. B.C.D. 00-47. In the initial Board decision on Herzog Transit Services, B.C.D. 09-02, the Board summarized the SCRRA decision and concluded that since SCRRA had assumed the responsibility for part of the railroad operations (dispatching for both intrastate and interstate carriers) that it became covered consistent with the Railroad Ventures' analysis. The Board's initial determination of Herzog goes on to analyze Herzog Transit under the Railroad Ventures factors and concludes that Herzog, as operator for DART, became covered upon their assuming the dispatching function which includes interstate passenger and freight trains. Unlike SCRRA and Herzog, Rail-Term does not own track nor provide train operations over leased track as in Herzog's case. Providing dispatching services by SCRRA and DART/Herzog changed their covered status because they owned track upon which interstate rail traffic moved along with their intrastate commuter operations. This is a very different factual situation than exists in Rail-Term.

While the majority certainly had the authority to find dispatching to be an integral part of railroading that could not be contracted out similar to engineers and conductors (see Rail- West, Inc. B.C.D. 95-51), the majority also chose to find Rail-Term itself to be a carrier which I do not believe is supportable under the Acts; therefore I dissent.

Note - Reference to the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers in footnote (2) of the majority opinion is not relevant since rail unions are subject to coverage under different statutory provisions than rail carrier employers under the RRA and the RUIA.

Original signed by:

Jerome F. Kever
March 26, 2010

EXHIBIT C

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT
3

4
5 RAIL-TERM CORP,

6 Petitioner,

7 v.

No. 11-1093

8 RAILROAD RETIREMENT BOARD,

9 Respondent.
10

Monday, October 24, 2011
Washington, D.C.

11
12 The above-entitled matter came on for oral
13 argument pursuant to notice.

14 BEFORE:

15 CIRCUIT JUDGES GARLAND AND KAVANAUGH AND
16 SENIOR CIRCUIT JUDGE GINSBURG

17 APPEARANCES:

18 ON BEHALF OF THE PETITIONER:

19 DENNIS M. DEVANEY, ESQ.

20 ON BEHALF OF THE RESPONDENT:

21 RACHEL L. SIMMONS, ESQ.
22
23
24
25

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Dennis M. Devaney, Esq.
On Behalf of the Petitioner

3; 40

Rachel L. Simmons, Esq.
On Behalf of the Respondent

26

1 P R O C E E D I N G S

2 THE CLERK: Case No. 11-1093. Rail-Term Corp,
3 Petitioner versus Railroad Retirement Board. Mr. Devaney for
4 Petitioner. Ms. Simmons for Respondent.

5 JUDGE GARLAND: Before we begin this case, I want to
6 acknowledge three special foreign dignitaries who are in the
7 back today. We're honored to be visited today by the
8 Honorable Nancy Baraza who's the newly appointed Deputy Chief
9 Justice of the Supreme Court of Kenya and the Honorable Paul
10 Kihara Kariuki who is a Judge of the High Court of Kenya and
11 the head of Kenya's Judicial Training Institute, and Gladys
12 Boss Shollei who is the newly appointed Registrar of the
13 Kenyan Courts. Our visitors are here on a trip sponsored by
14 the State Department and we welcome them to today's
15 proceedings. And with that, we'll begin with the first case.

16 ORAL ARGUMENT OF DENNIS DEVANEY, ESQ.

17 ON BEHALF OF THE PETITIONER

18 MR. DEVANEY: Thank you. Good morning, Your Honors.
19 May it please the Court. Dennis Devaney, Devaney Jacob Wilson
20 of Troy, Michigan, appearing today on behalf of Petitioner,
21 Rail-Term Corp. I request to reserve four minutes for
22 rebuttal and for closing argument. We chose to be here on
23 behalf of our client. Appellate jurisdiction would have lied
24 in the Seventh Circuit where the Railroad Retirement Board is
25 and the Second Circuit where our client has its headquarters

1 in Rutland, Vermont, or in the D.C. Circuit. We're here
2 because of this Court's historic role as Administrative Review
3 Court, the principle court, that has the expertise in this
4 area.

5 JUDGE GARLAND: Not here because there's a negative
6 opinion in the Seventh Circuit?

7 MR. DEVANEY: Well, I was going to, I was going to
8 say, Your Honor, we're also here because of a negative opinion
9 by the Railroad Retirement Board and the Seventh Circuit.

10 JUDGE GARLAND: Just checking.

11 MR. DEVANEY: We both got it wrong. The key
12 question for the Court is whether a nonrailroad entity that
13 provides computerized dispatching service for short-line
14 railroads and that does not own, lease, or operate railroad
15 lines or equipment, that doesn't hold any authority from the
16 Surface Transportation Board to provide railroad service, that
17 does not hold itself out to the public to provide railroad
18 service as a common carrier, is an employer for purposes of
19 coverage under the Railroad Retirement and the Railroad
20 Unemployment Insurance Acts.

21 JUDGE GINSBURG: Well, as I understood the opinion
22 of the Board, maybe you're about to get to this, the questions
23 are whether either the company is an employer or, in any
24 event, whether the employees of the company are statutory
25 employees under the Board's statute.

1 MR. DEVANEY: I agree, Your Honor. The issue is
2 this. The Railroad Retirement Act and the Railroad
3 Unemployment Insurance Act are interpreted in conjunction with
4 the Surface Transportation Act. The definition of employer in
5 the first section of the statute of the Railroad Retirement
6 Act says that a cover carrier by railroad under the Surface
7 Transportation Act is an employer.

8 JUDGE GINSBURG: So, shouldn't that be resolved by
9 the Surface Transportation Board?

10 MR. DEVANEY: Well, Your Honor, we tried to do that.
11 We asked the Surface Transportation Board for a claritory
12 ruling --

13 JUDGE GINSBURG: Yes.

14 MR. DEVANEY: because we believe that under that
15 statute, the Surface Transportation Board would conclude that
16 Rail Term is not a carrier. Unfortunately, the Surface
17 Transportation Board chose not to address that issue. They
18 said there was a pending reconsideration decision at the
19 Railroad Retirement Board and that there was the Seventh
20 Circuit Opinion in Herzog.

21 JUDGE GINSBURG: Where's the STBs response to you?
22 Is it in the JA?

23 MR. DEVANEY: It is not in the JA. There is a
24 summary in the JA that was put together by the Railroad
25 Retirement Board, and essentially, what the Surface

1 Transportation Board, it says two things. It says look, you
2 know, we're not going to reach this issue at this point
3 because the Railroad Retirement Board didn't ask us. They
4 didn't refer it to us, and secondly, that as a practical
5 matter, a reconsideration decision hadn't been filed at that
6 point by -

7 JUDGE GINSBURG: By the --

8 MR. DEVANEY: -- by Rail-Term.

9 JUDGE GINSBURG: By the railroad?

10 MR. DEVANEY: By Rail-Term, my client.

11 JUDGE GINSBURG: By Rail-Term. I shouldn't say the
12 railroad.

13 MR. DEVANEY: Yes. I would hope not, Your Honor.

14 JUDGE GINSBURG: And had not, and accordingly, had
15 not been rejected?

16 MR. DEVANEY: Absolutely not.

17 JUDGE GINSBURG: So, in other words, you're saying
18 it wasn't final.

19 MR. DEVANEY: Yes. And they suggested that since it
20 hadn't been referred to them as two earlier cases had been,
21 they didn't want to essentially get in the way of the
22 reconsideration --

23 JUDGE GINSBURG: So, you want us to resolve what the
24 STB, pardon me. What the, yeah, STB failed to resolve about
25 its own view or its statute?

1 MR. DEVANEY: Well, Your Honor, Your Honor, this
2 Court has jurisdiction to review the decision of the Railroad
3 Retirement Board. We think the decision is wrong on three
4 grounds. One is the statute is straightforward and not
5 ambiguous. To be covered as an employer under the Railroad
6 Retirement Act --

7 JUDGE GINSBURG: But, if we say that and it turns
8 out that next week the STB takes a different view, what
9 happens then?

10 MR. DEVANEY: Well, there would be a conflict and
11 there is some discussion in the number Keever, the dissenting
12 number of the RRB, that perhaps the better approach for the
13 RRB would have been to actually say their consideration and
14 request from the Surface Transportation Board an opinion as to
15 the status of Rail-Term.

16 JUDGE GINSBURG: Well, we can do that.

17 MR. DEVANEY: Well, I know you could and certainly
18 that would be from my client's perspective an acceptable
19 result.

20 JUDGE GINSBURG: I don't know that you specifically
21 urged that in your brief but under the Doctrine of Primary
22 Jurisdiction, we can suspend the proceedings while you take
23 the case to the STB saying it's before the Court. The
24 Railroad Retirement Board has issued its final decision and
25 the matters on review before the Court.

1 MR. DEVANEY: Your Honor, I don't disagree with you
2 on that. The only point I would make is the STB and not
3 taking up our request for declaratory release specifically
4 said one of the reasons it didn't do that was because it was
5 not referred by the STB.

6 JUDGE GINSBURG: Well, it wasn't referred by the
7 Court either but this time it would be.

8 MR. DEVANEY: Well, I think, obviously, if this were
9 referred I think it would have more weight, perhaps, than if
10 it --

11 JUDGE GINSBURG: Well, I don't think we can oblige
12 them to answer but under the Supreme Court and our own
13 precedent, we can directly, we can pose the question and I
14 think we need to let, I think you need to carry it to them.

15 MR. DEVANEY: Yeah. That certainly would be a
16 result that we think would be acceptable. We certainly try to
17 do that on behalf of our client because these two statutes,
18 even in the majority opinion in the Seventh Circuit, it
19 acknowledges that they must be read together, that the
20 definition of carrier by rail or railroad is something that
21 comes within the purview of the Surface Transportation Board.
22 I mean, the first part of the statute says that exactly.

23 JUDGE GINSBURG: Now, we wouldn't do this, I
24 suppose, if the other ground is sufficient to support the
25 Board's decision. I mean --

EXHIBIT D

EMPLOYER STATUS DETERMINATION

Tri-County Commuter Rail Organization
South Florida Regional Transportation Authority
Trinity Railway Express—Train Dispatching
Herzog Transit Services, Incorporated

EMPLOYEE STATUS DETERMINATION

JAS

This is the determination of the Railroad Retirement Board pursuant to 20 CFR 259.1 concerning the status of South Florida Regional Transportation Authority (SF RTA), Herzog Transit Services, Incorporated (Herzog Transit), and Trinity Railway Express (Trinity) as employers under the Railroad Retirement Act (45 U.S.C. § 231 et seq.)(RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.)(RUIA).

Herzog Transit has previously been determined not to be a covered employer. See: B.C.D. 94-109 *Herzog Transit Services, Inc.* SF RTA and Trinity have also previously been determined not to be covered employers under the names Tri-County Commuter Rail Organization and Dallas Area Rapid Transit (DART) . See Coverage Notices No. 89-35, dated April 19, 1989; and No. 91-66, dated August 19, 1991, respectively. After a review of the evidence, in section II of this decision a majority of the Railroad Retirement Board, Labor Member Speakman dissenting, determines that SF RTA is not a covered employer under the Acts. A majority of the Board, Management Member Kever dissenting, also determines, as explained in sections II and III below, that Herzog Transit is a covered employer only with respect to train dispatching over the rail line of Trinity Railway Express in Texas. The majority of the Board further determines in section III below that Trinity itself is not a covered employer to the extent the train dispatching operation conducted on Trinity's behalf is reported by Herzog Transit. Management Member Kever dissents from the determination that Herzog Transit is a covered employer with respect to train dispatching for Trinity.

This is also the determination of the Railroad Retirement Board pursuant to 20 CFR 259.1 concerning the status of JAS as a covered employee of CSXT under the Acts. As explained in section IV of this decision, the majority of the Board, Labor Member Speakman dissenting, determines that JAS is not in the service of CSXT while operating a locomotive driving a Herzog Transit passenger train for SF RTA.

and Railroad Unemployment Insurance Acts, as determined in Board Coverage Decision 94-109."

The Hearing Examiner held a hearing in Miami, Florida on May 16, 2006. The employees, the United Transportation Union (UTU), and Herzog Transit then submitted post-hearing briefs and additional documentary evidence. On August 18, 2006, the Hearing Examiner closed the administrative record.

The Hearing Examiner made his report to the Board on April 30, 2007, with copies furnished to Herzog Transit, UTU, and the employees. In his report, the Examiner recommended that the Board find that the changes in operations by Herzog Transit as a result of its commuter rail passenger operations for SF RTA in Miami; for Altamont Commuter Express in San Joaquin, California; for Waterfront Red Car in San Pedro, California; and for Rail Runner Express in Albuquerque, New Mexico did not render it a covered employer under the Acts. The Examiner further recommended that the Board find that Herzog Transit employees who dispatch freight service over the rail line of Trinity Railway Express (Trinity) in the Dallas-Fort Worth, Texas, are engaged in rail carrier service under a prior Board Decision. However, because Trinity had not been notified of or otherwise participated in the proceedings leading to the Hearing Examiner's report, the Examiner recommended the Board address the matter in a separate decision.

UTU, Herzog Transit, and the employees submitted exceptions to the Examiner's report on June 28, 2007. Herzog Transit also filed a response to the UTU exceptions on July 7, 2007. At the Board's direction, on December 7, 2007, the Hearing Examiner wrote to Trinity Railway Express to furnish a copy of his April 2007 report, and to allow Trinity to file any exceptions to the report as well. Trinity responded on January 17, 2008.

II. STATUS OF HERZOG TRANSIT AND SF RTA AS RAIL CARRIER EMPLOYERS

After reviewing the record and considering the Hearing Examiner's report and the exceptions thereto filed by the UTU, by Herzog Transit, by Trinity, and by Herzog employees, as well as the response to UTU exceptions filed by Herzog Transit, the majority of the Board, Labor Member Speakman dissenting, renders the following decision with respect to the status of Herzog Transit and SF RTA as rail carrier employers under the Acts:

1. Except as determined in Section III of this Decision below regarding the status of Herzog Transit as a lessee employer, the changes in the passenger service operations of Herzog Transit Services Inc. since the Board issued B.C.D. 94-109 do not render Herzog Transit a rail carrier employer covered by RRA section 1(a)(1)(i) and RUIA sections 1(a) and 1(b) because it is not subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title

3. Since the Board issued B.C.D. 94-109, Herzog Transit Services Inc. has contracted to operate the Trinity Railway Express in Dallas-Fort Worth, Texas. Trinity operates over a rail line which is jointly owned by the two constituent local transit agencies, Dallas Rapid Transit (DART) and the Fort Worth Rapid Transit agency ("the T"). In addition to operating commuter passenger trains, beginning January 2001 Herzog Transit has dispatched all train traffic over the Trinity line, including interstate freight trains. Trinity's retention of authority to direct train service over the rail lines owned by Trinity through DART and the T constitutes active rail carrier operation of the Trinity Railway Express rail line under the RRA and RUIA by Trinity as the owner/lessor. The assumption of this portion of active rail carrier operation by Herzog Transit Services under contract with Trinity renders Herzog Transit a lessee rail carrier employer under the RRA and RUIA effective January 1, 2001, the date Herzog Transit assumed the new duty under its contract. However, the unit of Herzog Transit which dispatches trains over the Trinity line constitutes a discrete unit which is segregable from the commuter passenger business of Herzog Transit pursuant to section 202.3 of the Board's regulations.

In rendering this decision, the Board unanimously adopts the Hearing Examiner's findings of fact as if set forth in full herein, except that the Board finds sufficient evidence following the January 2008 submission by Trinity to render a decision as part of this proceeding. In addition, a majority of the Board adopts the Examiner's conclusions of law 6 and 7, and the Examiner's analysis Part III as if set forth in full herein. The Hearing Examiner's report is appended to this decision. Management Member Kever dissents from the majority decision to adopt the Examiner's conclusions of law 6 and 7.

Both Herzog Transit and Trinity have filed exceptions to the Hearing Examiner's report, arguing that as Herzog Transit is a bona fide business, independent from ownership or control by Trinity, which supplies to Trinity a service pursuant to a contract negotiated at arms-length, no employees of Herzog should be considered to be employees of a rail carrier. This analysis is based upon the decisions of the Tenth and Eight Circuit Courts of Appeals in Nicholas v. Denver & Rio Grande Western R.R. Co., 195 F. 2d 428, (10th Cir., 1952); and Kelm v. Chicago, St. P. M. & O Ry. Co., 206 F. 2d 831, (8th Cir., 1953). The Board has applied the rule in Kelm to determine in numerous cases that the service of employees of an independent contractor are not attributed to the contracting railroad for purposes of coverage under the RRA and RUIA. See, e.g., B.C.D. 01-25 *Adecco Employment Services*; and B.C.D. 03-01 *Training Consulting Connection*. However, the majority of the Board will not apply the Kelm decision to Trinity's contract with Herzog Transit because the question in this instance is not the service performed by the employees, but rather the activity conducted by their employer, Herzog Transit, on behalf of Trinity. That is, the issue is not whether individuals on the payroll of a contractor are statutory employees of a railroad under RRA sections 1(b)(1) and 1(d)(1) and RUIA sections 1(d) and 1(e), but rather whether the contractor itself is a rail carrier employer under RRA section 1(a)(1) and RUIA section 1(a).

EXHIBIT E

**EMPLOYER STATUS DETERMINATION
Cape Cod Central Railroad, Inc. (CCCR)**

SEP 14 2000

This is a determination of the Railroad Retirement Board concerning the status of the Cape Cod Central Railroad, Inc. (CCCR) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Mr. John Kennedy, President of CCCR, provided information regarding the railroad. CCCR runs excursion trains on Cape Cod, Massachusetts. The train operates solely within Massachusetts and uses 23 miles of track which begins in Hyannis and ends in Bourne. The operation began May 28, 1999 and is seasonal, with the number of employees ranging from five employees in the winter months to as many as twelve part-time seasonal employees during the height of the season. CCCR does not own, control, or lease any track. The track used by CCCR is owned by the Commonwealth of Massachusetts Executive Office of Transportation & Construction, which leases the tracks to Bay Colony Railroad Corporation (BA 3112). CCCR does not interchange with any other railroad. According to Mr. Kennedy, CCCR's operation is smaller, but similar in service to the former railroads that operated the same tourist service over the past twenty years, identified as the former Cape Cod & Hyannis Scenic Railroad and the former Cape Cod Railroad. Neither of these former railroads paid into the railroad retirement system for the operation of excursion service.¹

Section 1(a)(1) of the RRA (45 U.S.C. § 231(a)(1)), insofar as is relevant here, defines a covered employer as:

¹According to Railroad Retirement Board records, the Cape Cod & Hyannis Railroad (CC&H) operated from June 13, 1981 through November 7, 1988. In a legal opinion issued March 20, 1990 (L-90-40), the CC&H was found to be an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act for a brief period of time during which CC&H had a through ticket arrangement with Amtrak. Specifically, CC&H was found to be an employer during the period June 21, 1988 through September 2, 1988. On July 24, 1990, the Board ordered the relief of the CC&H from the liability for RUIA contributions for the period June 21, 1988 to September 2, 1988. Board records do not reflect an employer status determination for the Cape Cod Railroad, the latter railroad identified by Mr. Kennedy.

Cape Cod Central Railroad, Inc. (CCCR)

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49 [45 U.S.C. §231(a)(1)(i)].

Sections 1(a) and (b) of the RUIA (45 U.S.C. §§ 351(a) and (b)) contain substantially the same definition, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The information summarized above indicates that CCCR is a carrier by rail, since it operates a passenger railway. However, CCCR does not operate, and has never operated, as a common rail carrier in interstate commerce. Rather, it provides excursion service solely within the State of Massachusetts. Thus, it is not within the jurisdiction of the Surface Transportation Board. See, 49 U.S.C. 10501(a)(2)(A) (the STB has jurisdiction over transportation between a place in a state and a place in the same or another state as part of the interstate rail network).

The Board finds that since Cape Cod Central Railroad, Inc., does not perform service as a rail common carrier in interstate commerce, it is not an employer under the RRA and the RUIA.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever

EXHIBIT F

B.C.D. 03-27

March 21 2003

**EMPLOYER STATUS DETERMINATION
Northern New England Passenger Rail Authority**

This is the determination of the Railroad Retirement Board concerning the status of the Northern New England Passenger Rail Authority as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

The Authority was established in 1995¹ as a state agency by the Maine Legislature for the general purpose of promoting passenger rail service. The Authority was directed to give priority to the restoration of rail service between Portland and Boston and on December 2, 1996, entered into an agreement with Amtrak for the provision by Amtrak of passenger service between Portland and Boston. Amtrak's Portland-Boston service, known as "The Downeaster," began on December 15, 2001. The Authority has five employees. The first date on which an Authority employee was compensated was July 17, 1999.

The Authority does not operate the rail line in question itself and does not have Surface Transportation Board authority to do so. The rail lines involved are owned by Portland Terminal Company, by Boston and Maine Corporation (both covered employers under the Acts; B.A. Nos. 4105, 1102, respectively), and by Massachusetts Bay Transportation Authority (not a covered employer), and are not owned by the Authority.

The Authority derives no revenue from Amtrak's operation of the Downeaster and reimburses Amtrak the difference between the revenue Amtrak receives from passengers and Amtrak's cost of operation of the Downeaster.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

- (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;
- (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

The Authority is not a carrier by railroad subject to the jurisdiction of the

Surface Transportation Board. Further, it is not owned or controlled by, or under common control with, a railroad employer. Nor does it fall under any other definition of an employer under the Acts administered by the Board.

Accordingly, it is determined that the Northern New England Passenger Rail Authority is not an employer within the meaning of section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)) and the corresponding provision of the Railroad Unemployment Insurance Act.

Cherryl T. Thomas

V. M. Speakman,
Jr.
(Seperate
dissenting
opinion attached)

Jerome F. Kever

1 The legislation establishing the Authority was effective June 29, 1995. The first meeting of the Authority's board of directors was held in September 1995.



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**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

RAIL-TERM CORP.,)	
)	
Petitioner,)	
v.)	Appeal No. 11-1093
)	
UNITED STATES RAILROAD)	
RETIREMENT BOARD,)	
)	
Respondent.)	

REPORT

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:
(Judges Garland and Kavanaugh, *Circuit Judges* and Judge Ginsburg,
Senior Circuit Judge)

In accordance with the Order and Memorandum of the Court dated November 21, 2011, counsel for Rail-Term on December 1, 2011 met with staff of the Surface Transportation Board ("STB") to inform them of the Court's Order and to notify the STB that Rail-Term intended to re-submit a Declaratory Petition request to the STB to obtain the Board's position on whether Rail-Term would be considered a "rail carrier" under 49 U.S.C. § 10102(5).

Rail-Term's Petition for Declaratory Relief is being filed with the STB today contemporaneously with this Report to the Court. A copy of

Rail-Term's Petition is attached for the Court's information.

Counsel for Rail-Term will inform the Court as soon as it receives the Surface Transportation Board's statutory interpretation. At that time and in accordance with the Court's Order Rail-Term will file appropriate motions.

Respectfully submitted,

RAIL-TERM CORP.

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Dated: December 14, 2011